Supreme Court of the United States

October Term, 1940

No. 586

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellant,

vs.

DOROTHEA T. FRANK,

Appellee.

MOTION BY APPELLEE TO DISMISS

LOUIS J. VORHAUS,
Counsel for Appellee.

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Now comes the appellee, Dorothea T. Frank, and moves to dismiss the appeal herein, on the ground that the appeal (R. 47) is improperly directed to the Appellate Term of the Supreme Court of the State of New York, First Department, instead of the Municipal Court of the City of New York, Borough of Manhattan, Ninth District.

This ground has not already been advanced in opposition to the noting of jurisdiction of the appeal. The grounds then advanced were (1) that the case presents no substantial Federal question; and (2) that the question on which the decision depends is so unsubstantial as to need no further argument.

The cause originated in the Municipal Court (R. 1, 52). From judgment in the appellee's favor (R. 36-37), appellant appealed to the Appellate Term of the Supreme Court (R. 37). That Court affirmed (R. 41).

The New York City Municipal Court Code, §163 (N. Y. Laws of 1915, Ch. 279, p. 896), provides:

> "The judgment or order of the Appellate Court must be remitted for enforcement to the court below; and the clerk of the Appellate Court shall return to the clerk of the court in the district from which the appeal was taken, all the papers upon which the appeal was heard."

New York Civil Practice Act, §629 (Laws of 1920, Ch. 925, Vol. 4, p. 220; as amended by Laws of 1936, Ch. 656, p. 1435, in effect Sept. 1, 1937), provides:

> "Where the appeal is from * * * the Municipal Court of the City of New York, the judgment or order of the Supreme Court must be entered in the office of the clerk of such court."

Pursuant to the foregoing statutory provisions, the Clerk of the Appellate Term remitted to the Municipal Court on July 2, 1940, all the papers on which the appeal was heard (R. 42-43, 53-54), and thereupon the judgment of the Supreme Court was entered in the Municipal Court (R. 42-43).

On October 11, 1940, when this appeal was allowed (R. 47), the Appellate Term was not possessed of the record (R. 53-54).

Thus, by the State practice, the papers transmitted to the Appellate Court were, upon the decision by that Court, remitted to the lower court, no copy of the record being retained by the Appellate Court, and judgment on such remittitur was entered in the lower court. Therefore, the appeal should have been directed to the Municipal Court and was improperly directed to the Appellate Term.

Central New England R. Co. v. *Boston & A. R. Co.*, 279 U. S. 415; 49 Sup. Ct. 358.

Hodges v. *Snyder*, 261 U. S. 600; 43 Sup. Ct. 435.

Myers v. *International Trust Co.*, 273 U. S. 380, 381; 47 Sup. Ct. 372.

Davis v. *L. L. Cohen & Co.*, 268 U. S. 638; 45 Sup. Ct. 633.

Wedding v. *Meyler*, 192 U. S. 573; 24 Sup. Ct. 322.

Polleys v. *Black River Improvement Co.*, 113 U. S. 81; 5 Sup. Ct. 369.

The course subsequently pursued, of procuring the return of the record from the lower court to the Appellate Court, by order entered October 21, 1940 (R. 59-52), is unavailing. The appeal should in any event have been directed to the Municipal Court in which the judgment of the Appellate Term was entered. (*Central New England R. R. Co.* v. *Boston & A. R. Co.*, supra.) Assuming, however, the appeal might have been directed to the Appellate Term had it been possessed of the record, such was not the case; the record, when the appeal was allowed, was in the Municipal Court; the appeal directed to the Appellate Term was without vigor; the subsequent recall of the record could not vitalize it.

The appeal should therefore be dismissed.

Respectfully submitted,

Louis J. Vorhaus,
Counsel for Appellee.